

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

MLR, LLC,

Plaintiff,

v.

DELL INC.,

Defendant.

Civil Action 1:14cv135 (GBL/TRJ)

The Hon. Gerald Bruce Lee
Mag. Judge Thomas R. Jones, Jr.

**MLR’S MEMORANDUM IN SUPPORT OF ITS
MOTION TO COMPEL DEPOSITIONS**

In support of its motion to compel Defendant Dell, Inc. (“Dell”) to provide individuals for depositions before the close of discovery, Plaintiff MLR, LLC (“MLR”) states as follows:

BACKGROUND

Discovery is set to close on November 14, 2014. *See* ECF No. 19 at 1. The parties agreed that fact and expert discovery would both close on this date. *See* ECF No. 40 at 13.

Dr. Stephen Wicker (Dell’s Invalidation Expert):

On October 9, 2014, MLR noticed the expert deposition of Dr. Stephen Wicker. Counsel for Dell contacted MLR and stated that Dr. Wicker was not available on the noticed date (October 22, 2014) and not available in Chicago, but could be available on November 18, 2014, in Ithaca, New York. Counsel for MLR countered that it would be willing to travel to Ithaca, New York, but would like the deposition to proceed on November 16, 2014. Having heard no response to this request, on Friday October 24, 2014, counsel for MLR asked for confirmation of that date, among others. In response, counsel for Dell stated:

part of this depends on whether we obtain an extension re discovery – we would like an 8 week extension as to the new counterclaims and 2 weeks for the patent

case – it is our understanding that you all do not agree to that, and we are filing that Motion today.

See Ex. A (emphasis added). Dell had not yet filed any motion for extension. Such a motion would be heard at the earliest on October 31, 2014. Another week will have gone by, increasing the costs of and decreasing the availability of airfare as well as injecting unnecessary uncertainty regarding the time and timing for preparation.

Supplemental Rule 30(b)(6) Topics:

On October 10, 2014, at 11:56 p.m. (EST), Dell amended its answer, affirmative defenses, and counterclaims (despite only a cosmetic correction of MLR's complaint) to add ten new counts, including two counts for conspiracy to violate Section 1 of the Sherman Act. Dell did not seek leave of court to make this massive expansion of its counterclaims. Nevertheless, both parties served paper discovery on these claims and MLR served a supplemental notice of Rule 30(b)(6) deposition covering these new topics, on October 17, 2014. On October 20, 2014, MLR sought a date and identity of a designee for the supplemental topic. Counsel followed up by email today. Counsel for Dell responded as noted previously. Dell has not identified a deponent or provided any date within the discovery period.

Dell's Damages Expert:

By agreement, the parties have permitted Dell to disclose its damages expert and report on October 28, 2014. Because that individual has not yet been identified, MLR asked Dell informally to provide that expert for deposition on November 3, 2014, as part of the October 20, 2014 request. *See* Ex. A (point number 9). MLR believes this to be Carrie Distler of FTI in Chicago. As with its other two deponents noted above, Dell has not provided alternate dates within the discovery cut off. Instead it has delayed, relying on its intended motion to extend discovery.

ARGUMENT

MLR is entitled to depose Dell's experts and a corporate designee on topics relevant to the claims and defenses in the lawsuit. *See generally* Rule 26 and 30, Fed. R. Civ. P. MLR has formally noticed the depositions of these individuals where possible and has informally requested the deposition of the third where this person has not yet served their expert report. MLR has not insisted on the dates originally noticed, but has attempted to work in good faith to schedule these at mutually convenient times and places. Dell is now unnecessarily putting all discussion of scheduling these depositions off until after this Court might rule on its motion for an extension of discovery. In effect, Dell is creating its own reasons for granting such a motion. This is not proper.¹

CONCLUSION

For the foregoing reasons, MLR's motion to compel should be granted and Dell should be ordered to produce Dell's 30(b)(6) corporate witness on all remaining topics; Dell's expert on damages; and Dr. Stephen Wicker on mutually-agreeable dates certain before the close of discovery.

¹ Counsel for Dell noted that "part of this [presumably, the scheduling] depends on when we will get documents from Mr. Marino and Mr. Leedom. This purported reason, however, does not relate to any of the Dell deponents. Both Mr. Leedom and Mr. Marino have their depositions scheduled. MLR is working on compliance with this Court's order on Dell's motion to compel, which is due under the Local Rules on Wednesday, October 29, 2014.

Dated: October 24, 2014

Respectfully submitted,

/s/ Nicholas V. Cumings

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that service of the foregoing document has been served on October 24, 2014, *via* email to these counsel of record for Dell:

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